# Exhibit A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case No. 18-23538-rdd
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In the Matter of:

SEARS HOLDINGS CORPORATION, et al.,

Debtors.
- - - - - - - - - - - - - - - - - - - - - - - - - - - - x

United States Bankruptcy Court
300 Quarropas Street, Room 248
White Plains, NY 10601

August 23, 2019
10:16 AM

B E F O R E :
HON ROBERT D. DRAIN
U.S. BANKRUPTCY JUDGE

ECRO: NAROTAM RAI

HEARING re Continuance from 8/22/2019 and Evidentiary Hearing on MOAC Mall Holding LLCs Objections

MOAC Mall Holding LLC's Objection to Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction (document #2199)

MOAC Mall Holding LLC's Second Supplemental and Amended: (I) Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases, and (II) Objection to Debtor's Stated Cure Amount (document #3501)

MOAC Mall Holding LLC's Third Supplemental and Amended: (I) Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases (document #3926)

MOAC Mall Holding LLC's Fourth Supplemental (I) Objections to Reply to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases, and (II) Objection to Debtor's Stated Cure Amount (document #4450)

Transform Holdco LLC's Reply to MOAC Mall Holdings LLC's (I) Objection to Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction; (II) Second Supplemental and Amended: (A) Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases, and (B) Objection to Debtor's Stated Cure Amount; and (III) Third Supplemental and Amended Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases (document #4454)

So Ordered Stipulation Signed on 5/13/2019 By and Among Sellers, Buyer, and Landlord (MOAC Mall Holding LLC) (I) Extending Time Under Section 11 U.S.C. Section 365(d)(4) for Lease of Nonresidential Real Property and (II) Setting Briefing Schedule (document #3823)

Declaration of Rich Hoge Supporting MOAC Mall Holdings LLC's Third Supplemental and Amended Objections to Debtor's Notice of Assumption and Assignment of Additional Designatable Leases (document #3927)

Stipulation and Order signed on 6/25/2019 By and Among Sellers, Buyer, and MOAC Mall Holding LLC Extending Time Under 11 U.S.C. § 365(d)(4) For Lease of Nonresidential Real

Property(document #4354, 4687)

Declaration of Thomas J. Flynn in Support of 4450 Fourth Supplemental Objection (document #4451)

Stipulation of Agreed Exhibits Regarding Assumption and Assignment of the MOAC Lease Filed by Thomas J. Flynn (document #4864)

Stipulation of Facts Not in Dispute Regarding Assumption and Assignment of the MOAC Lease Filed by Thomas J. Flynn (document #4865)

Transform Holdco LLCs Supplemental Reply and Cross-Motion to; (A) Strike MOAC Mall Holdings LLCs Fourth Supplemental (I) Objections and Reply to Debtors Notice of Assumption and Assignment of Additional Designatable Leases, and (II) Objection to Debtors Stated Cure Amount; and (B) Permit Late Filed Responses to Requests for Admission (document #4867)

Declaration of Louis W. Frillman in Opposition to the Proposed Assumption and Assignment of the MOAC Lease (document #4874)

Declaration of Raphael Ghermezian in Opposition to the Proposed Assumption and Assignment of the MOAC Lease filed by Thomas J. Flynn (document #4875)

Declaration of Richard Hoge in Opposition to the Proposed Assumption and Assignment of the MOAC Lease filed by Thomas J. Flyrui (document #4876)

Declaration - Evidentiary Hearing Declaration of Roger A. Puerto In Support of Transform Holdco LLCs Reply to MOAC Mall Holdings LLCs (I) Objection to Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction; (II) Second Supplemental and Amended: (A) Objections to Debtors Notice of Assumption and Assignment of Additional Designatable Leases, and (B) Objection to Debtors Stated Cure Amount; and (III) Third Supplemental and Amended Objections to Debtors Notice of Assumption and Assignment of Additional Designatable Leases (document #4879)

Declaration - Evidentiary Hearing Declaration of Michael Jerbich In Support of Transform Holdco LLCs Reply to MOAC Mall Holdings LLCs (I) Objection to Supplemental Notice of Cure Costs and Potential Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with Global Sale Transaction; (II) Second Supplemental and Amended: (A) Objections to Debtors Notice of Assumption and Assignment of Additional Designatable Leases, and (B) Objection to Debtors Stated Cure Amount; and (III) Third Supplemental and Amended Objections to Debtors Notice of Assumption and Assignment of Additional Designatable Leases (document #4880)

Opposition Brief MOAC Mall Holdings LLC's Pre-Evidentiary Hearing Brief Regarding the Proposed Assumption and Assignment of the MOAC Lease filed by Thomas J. Flynn (document #4889)

Transform Holdco LLC's Amended Supplemental Reply and Cross-Motion to Strike MOAC Mall Holding LLC's Pre-Evidentiary Hearing Brief Regarding The Proposed Assumption and Assignment of the MOAC Lease (document #4903)

MOAC Mall Holdings LLC's Reply Objecting to Transform Holdco LLC's Motion to (A) Strike MOAC's July 8 Supplemental Objection and (B) Permit Late Responses to Requests for Admissions (document #4915)

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Okay, good morning. In re Sears Holdings Corp et al?

MR. CHESLEY: Your Honor, Richard Chesley, Rachel Albanese, Craig Martin, and Alana Friedberg on behalf of Transform. We’re here on the only matter today, which is the Mall of America assumption and assignment motion. We’ve spoken to Debtors’ counsel in light of the nature of this proceeding, discussed with Debtors’ counsel just moving forward, so. Unless the Court has any procedural issues, our position on this, Your Honor, in terms of how we would like to proceed today, obviously, a substantial amount of information has been presented to the Court. There are stipulated facts that are agreed exhibits. We’ll have five witnesses whose directs have been submitted by declaration.

We believe the issues have been fully formed, and with the Court’s approval, we would like to simply proceed with the evidentiary presentation. At that point, we can address argument or any other matters the Court would like. At that point, we think we could do this much more efficiently and effectively today, and again, I don't think there’s any surprises to the Court as to what the issues are.

THE COURT: Okay. Well, I normally do not take opening arguments, so my normal practice would be to do just

A I'm aware of adequate assurance as far as (indiscernible) of future performance.
Q Just so we're clear, Transform Co. is not going to operate a store at the Mall of America, is that right?
A Correct. It's an asset of Transform Co., correct.
Q There will be no operations or operating performance by Transform Co. at the Mall of America, is that right?
A Our plan is not to operate. That is correct.
Q As you sit here today, do you know -- do you have a tenant ready to take over that space and operate in it?
A As I sit here today, I have interest from multiple tenants, but it's a process that takes time.
Q So, you have no tenant, at today's hearing, that would take over and operate in that space?
A Today? Literally today? No.
Q Yes, literally today. All right. There's nothing in your testimony submitted to the Court by declaration that indicates any evidence or discussion how Transform Co. will or a hypothetical tenant might operate from the premises, is that correct?
A Can you be more specific with your question? I'm not sure I'm understanding it.
Q Well, you have nobody that's going to operate in the premises as you sit here today.
A You asked me that earlier if I have a tenant today and

I said no.
Q You're unable to show today anybody that could be -- because you have no one.
A I don't think that's an accurate characterization of what I said at all. The lease is significantly below market, we're paying $10 (indiscernible).
THE COURT: All right, just stop. Sir, you don't need to ask the same question three times.
MR. FLYNN: You bet. Yes, Your Honor.
Q There's no one that -- you did say --
MR. FLYNN: That's all I have, Your Honor. Thank you.
THE COURT: Okay. I would like to follow-up on one of Mr. Flynn's question.
MR. JERBICH: Sure.
THE COURT: You're not an actual employee of TransCo, right? You work -- you're a consultant for them?
MR. JERBICH: Correct.
THE COURT: Has Transform, excuse me, placed any limitations on you as far as the types of tenants that you are soliciting?
MR. JERBICH: No.
THE COURT: None? So, if --
MR. JERBICH: I mean, to the extent, obviously, within the parameters of the lease, the REA.

estate, that would be the process to undertake.
Q If there was an anchor tenant available for de minimis rent, that'd be an excellent fit for the mall, you wouldn't agree to that, would you?
A Not if it didn't maximize the value of the real estate.
Q Yeah, right. So, you're interested, primarily, in getting money. Not necessarily the mall, as I think it was concluded.
A Can you rephrase that? Sorry.
MR. FLYNN: Never mind. I have no further questions, Your Honor.
THE COURT: Okay. Any redirect?
MR. MARTIN: No, Your Honor.
THE COURT: Okay. You can step down.
MR. PUERTO: Thank you.
MR. CHESLEY: That would conclude Transform's evidence, Your Honor.
THE COURT: Okay. And obviously, I have the agreed exhibit --
MR. CHESLEY: Agreed exhibits which have been admitted and stipulated as fact. Yes, Your Honor.
THE COURT: Okay. You may proceed with your witnesses.
MR. FLYNN: Your Honor, we'd like to move, at this time, under Rule 52, for partial findings against the

Plaintiff -- against the Debtor. They have failed in their burden of proof; which they admit they have to prove adequate assurance of future financial ability and adequate assurance of future performance. They -- performance means not financial performance, it means operational performance. Is the tenant able to drive tenants to the mall? Do they have a substantial advertising budget? Do they -- and this is all cited in the cases, which I'm sure you could read or are well aware of.

THE COURT: Actually, I have not seen that cited in a case, so I'd like you to cite them to me.

MR. FLYNN: Can I have the brief? Well, I will cite those. I will -- we have filed a brief with the Court, which has these cases in there.

THE COURT: Well, then you better cite me to the specific provisions in the cases, because I didn't see that.

MR. FLYNN: Well, all right.

MAN: You don't have to do it now.

MR. FLYNN: All right. There are a number of cases that we've cited, and I can go quickly through them, including the Third Circuit, which requires adequate -- that performance drive -- to do a number of things to aid or fit in with the harmony of the mall and the tenant mix. They have given no evidence that they're able to comply with what's required for tenant mix. They've given not -- that

is a requirement under the code. They are required to show operating performance equal to -- similar to that Sears at the time they entered into the lease. We went into that extensively in our briefs, operating performance, and they have presented no operating performance because they don't intend to operate. They're going to try to find somebody to operate, and all we can do is speculate on what operation performance might be in the future.

However, I see nothing in the code that says they can prove that at a future date. They have to prove today what the operating performance will be. They can do certain things at a future date. If they are dark, they get some reasonable time to reopen. But they can't come into court today and say, don't worry about operating performance or tenant mix. We'll fix that later. And those are rights in addition to the rights under any lease, because they don't refer to the -- they're required to be in a lease or (indiscernible).

THE COURT: You're aware that there are several cases in this District that disagree with that latter proposition, including in re Ames Department Stores, 127 B.R. 744, (Bk. SDNY 1991)?

MR. FLYNN: I'm aware that there's a mix in case law on this, but there's no -- the operating performance is a requirement of the code, and they presented nothing, and

THE COURT: -- referring to his colleague to walk me through the lease and the REA.

MR. FLYNN: I would argue, too, for what it's worth, is the decode itself in I think a number of the cases, and we'll cite them, do not -- it doesn't say what's in the lease. It doesn't say or require that it be protected by their lease. It's an additional requirement put in by Congress, if you intend to use Chapter 11, to get these transactions done this way. And they have chosen Chapter 11 to get these transactions done this way. They are bound by the strict, reasonable readings of the law. And whether or not it's in a lease, they are required to show that they have adequate financial wherewithal and a plan that makes some sense, and performance. And they simply can't do it, because there's nobody to be put in there at this point and they don't know what will happen.

THE COURT: Well, if the lease lets them operate in a specific way, you're saying nevertheless, the Court should provide some other gloss on operation?

MR. FLYNN: Yes, and the thinking of that --

THE COURT: Yeah? Do you have any case that takes that view?

MR. FLYNN: Yeah, there's a number of them, but they say --

THE COURT: Okay, I just -- I'd be happy to be

cited to one.

MR. FLYNN: All right, yes, Your Honor. I have it marked up here on our brief.

THE COURT: Okay.

MR. FLYNN: The Casual Male, 120 B.R. 264 is one. They require In Re Rikel, which was cited often, involved a lease that allowed it to go dark. I have the cite here, but -- and the Court said, we're going to make you open within six month, and you have to have a tenant that the landlord will agree to.

THE COURT: That's how you read Rikel?

MR. FLYNN: Yes, I do.

THE COURT: All right. Okay.

MR. FLYNN: Yes, I do. In fact --

THE COURT: So it's just the cases you cited in your brief, no other cases for me?

MR. FLYNN: I think there are other cases. We could come up with more, but that's a good start. And there's a Third Circuit case and -- so, yeah.

THE COURT: Okay.

MR. FLYNN: And others cited. And Rikel, yeah, involved a landlord that, the premises go dark, and the code -- they sit under the -- because we think in the legislative history, which we also supply to the Court, we have some (indiscernible) cases in state that because landlords,

first-class operator, or an operator whose store would be consistent for a first-class shopping center, that would include some financial wherewithal.

MR. FLYNN: Yes, yes. And, but the point is, we don't know who that is today.

THE COURT: Well, no, but if they provide it, then you could say, no, these people aren't -- they're not consistent with the operation of a first-class shopping center.

MR. FLYNN: That's true, except I see nothing, and our position would be that there's nothing in the code that allows them to show (indiscernible) to that in the future. They are required to show that today --

THE COURT: Well, they're required under the lease to show you in the future -- they would be.

MR. FLYNN: There are many requirements in the future under the lease.

THE COURT: Right.

MR. FLYNN: I'm referring to the code, and the code doesn't say, don't worry about it, you can show later whether they'll be adequate, there will be a proper mix. Don't worry about it.

THE COURT: Okay.

MR. FLYNN: We'll leave that go.

THE COURT: All right, but that just comes back to

the issue as to whether 365(b)(3) requires the Court to determine, separate and apart from the contract, pursuant to which adequate assurance of performance has to be shown -- or under which adequate assurance of future performance has to be shown, i.e. that contract, that you have to look into, generally, issues as to what makes up a proper mix or balance in a shopping center, for example.

MR. FLYNN: Well, and you've got to do that today, and --

THE COURT: Well, that's where we have a dispute, I guess.

MR. FLYNN: Okay.

THE COURT: Again, I have yet to see a case that says that, and I've seen several that go the other way.

MR. FLYNN: So there are many cases that say that you have to show how the tenant will drive customers to the mall.

THE COURT: Show me one.

MR. FLYNN: I'll quote from it.

THE COURT: Okay.

MR. FLYNN: Just a minute, Your Honor. One of the leading cases -- I apologize, Your Honor.

THE COURT: Okay.

MR. FLYNN: In Re Joshua Slocum, that's a 922 F.2d 1801, (Third Circuit 1990), Congress in 1978, and again in

'84, placed additional restrictions on assignment of shopping center leases in order to protect the rights of lessors and -- and here's the key phrase -- the center's tenants. And then it says, Congress -- and it doesn't say, unless they (indiscernible) or didn't in the lease. Congress recognized that -- of the unusual situation where a lease assignment affects not only the lessor, but an assignment shopping center to lease to an outside party can have significant detrimental impact on others. Okay? So we don't know what the impact will be unless we know --

THE COURT: I read Joshua Slocum.

MR. FLYNN: Okay.

THE COURT: The issue that we're discussing is not dealt with in Joshua Slocum. Those are general statements of the purpose of the law.

MR. FLYNN: Okay. All right, Your Honor. And, again, In Re Rikel, it says specifically that even though there's no -- there's a go dark -- they're allowed to go dark, they should -- they have to reopen within a reasonable time and required them to do so within six months.

THE COURT: But there was a specific prohibition in the lease in Rikel about going dark.

MR. FLYNN: Right. Right.

THE COURT: So, again, the issue (indiscernible) there as to whether 365(b)(3) imposes conditions on the

parties that they didn't already bargain for.

MR. FLYNN: In Rikel, I believe it had -- the tenant had the right to go dark and the Court there specifically said, you've got to open up. I'm sure that that's the case. It specifically said that. And in fact, it's been acknowledged by the other side, and they've offered to open up within two years in their pleadings.

Again, Casual Male states, and I quote, "The assignee should have similar operating and financial performance when all factors, including advertising, aggressiveness, profit margins, growth potential, and other indicia are weighed." It doesn't say, just look at can they pay the rent. We don't protect tenants when we just say, well, all they got to do is pay the rent, and that's what Congress was intending to protect. And I believe -- I believe -- the Third Circuit has also agreed to that.

But they also concerned in -- about whether or not a tenant will go bankrupt in the space again, and that would be inimical to the mall and cause -- and that's under the Bankruptcy Code. They require that you show that the tenant not be likely to go bankrupt, the one operating there. If there's another bankruptcy of that tenant, we are going to be in trouble again. We have no evidence of what they intend to do and what tenant they have. They have none. They're allowed to just skip by all that and just say, don't

what they can and can't do because we disagree about those. But I think -- I appreciate the court considering that our rights today is important to us. And --

THE COURT: Sorry to interrupt. In Mr. Ghermezian's testimony, he did not know when the form of Bloomingdale's space was fully sublet, but you did testify that the store was closed in 2012. Is there anything in the record to show when the first subleasing or tenancy was?

MR. FLYNN: No, Your Honor.

THE COURT: Oh.

MR. FLYNN: And just as an aside. I don't think it's controversial. It isn't -- still isn't sold but rented.

THE COURT: Well, I'm more focusing on the --

MR. FLYNN: Yeah.

THE COURT: -- buyout provision.

MR. FLYNN: Right.

THE COURT: I mean, I -- let me pose this question to the Debtor, all right, to Transform. Is Transform prepared to put some outside date on its first assignment of the property or subletting of the property? I mean, the prospect of just standing there and torturing MOAC for 73 years is, you know, obviously not a welcome one.

MR. CHESLEY: Well, it makes no economic sense for us either at $1 million a year. If I could talk really

briefly with Mr. (indiscernible), I can probably answer this relatively quickly --

THE COURT: Okay.

MR. CHESLEY: -- Your Honor. If I can.

Your Honor, I think it's consistent with the declaration as well. We could certainly live with the two-year outside date provided that we don't get interference from the landlord. If we've got the ability to go out and bring people in -- I'm not asking them to bend over backwards but, again, not interfere with our ability to sublet.

THE COURT: Two years to sublet some -- or assign some portion of this thing.

MR. CHESLEY: Yes, Your Honor.

THE COURT: Okay.

MR. FLYNN: Your Honor, may I address that?

THE COURT: Sure.

MR. FLYNN: That may be very little solace. There's three huge floors there. They could -- are they going to sublet --

THE COURT: No, I understand that, but I'm focusing -- you don't have to -- I'm not asking you to agree with me. I'm focusing on 6.3. If they sublet any, you know, any other than, you know, on, you know, a tobacco stand or something -- if they sublet anything, 6.3 kicks in,

certain statutory safeguards, the value of a Debtor's leases should go to the Debtor's creditors and that leases can be sold to achieve that end, with or without landlord consent. That theme runs throughout the caselaw, interpreting Sections 365, including, as noted by the district court and (indiscernible) LLC the A&P, In re A&P 472 B.R. 666, 679 (Bankr. S.D.N.Y. 2012).

It's also important to note that the four protections specifically provided for in connection with adequate assurance of future performance of a shopping center lease is with respect to just that: adequate assurance of future performance of a lease of real property, i.e. the focus is on performance of a lease in the future.

Before turning to those sections, I should note the following. Based on the record before me, it is clear that Transform, the assignee, separate and apart from those four sections has, in fact, provided adequate assurance of future performance of the lease.

The caselaw is clear when dealing with adequate assurance generally that the Court should employ a pragmatic analysis as to whether sufficient assurance has been provided that the lease will be performed in the non-shopping-center context that focuses generally on the ability to pay rent on a going-forward basis, both the specific rent and other financial performance such as

payment of taxes, common area maintenance charges, and the like, which are either denominated as rent or a separate financial obligation under the lease.

It is not an absolute guarantee but rather focuses on whether performance is likely, i.e. more probable than not. See generally in re M. Fine Lumbar Co. 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008) and the cases cited therein.

And yet outside of the (b)(3) context, it is routinely held that adequate assurance can be shown in large measure simply by the fact that the lease itself is a favorable lease, i.e. favorable to the tenant, and has significant value. The theory being that even if the tenant defaults, the landlord will not be damaged because it will be able to reap the value of the then-terminated lease, at Page 573.

In addition, courts very typically look to some form or other of security deposit, either in the form of a letter of credit, escrow agreement, or deposit with the landlord. If necessary, they go further to examine the assignees financial condition, although they are perfectly willing to accept a newly formed entity as an assignee, particularly where there is a sufficient security deposit or escrow, and the newly formed assignee is run by a principle that has substantial experience in whatever business the assignee intends to conduct and has a financial stake in

that business succeeding.

Here, it appears clear to me that this lease is a very favorable lease. The stated rent under the lease is $10 a year. Parties agree that the aggregate monetary obligation of the tenant, which includes an obligation to pay its share of taxes and other common charges and fees, is somewhere between 1,000,001 and 1,000,002 annually.

The assignee has committed to put into escrow, and it would obviously have to be an escrow that has no strings attached to it other than the occurrence of nonpayment that sum of money.

In addition, it's clear to me from the record and, in addition, documents with which I can take -- of which is could take judicial notice of the docket of this case that the assignees' senior management has extensive experience in marketing and selling Sears' real property, including favorable leases.

In addition, although I don't believe under the circumstances this would be necessary for finding adequate assurance for future performance under Section 365(b)(1) and (f)(2)(b), it appears to me that Transform has successfully completed substantial financings with respect to both its operating portfolio and its real estate portfolio.

While I do not believe I can accept as whole -- however wholly the statement in the draft consolidated

financial statement offered by Transform as part of its showing of adequate assurance of future performance that it has in excess of 250 million of equity. I do believe that it has substantial equity and that it's highly likely that that equity exceeds $50 million. I cannot believe that third-party lenders would provide the level of financing that they have to transform without at least that level of solvency.

The legal support for all of the foregoing discussion of the applicable standard, in addition to the M. Fine Lumber case that I just cited can be found in numerous cases which focus on the foregoing types of adequate assurance, and the fundamental focus on the assignee's ability to pay rent, as stated by the District Court in In Re Sanshoe Worldwide Corp. 139 B.R. 585, 592 (S.D.N.Y. 1992). See also In Re Citrus Tower Boulevard Imaging Center, LLC., 2012 Bankr. LEXIS 2208 at Pages 15 through 20, (Bankr. N.D. Ga. Apr. 2, 2012), In Re Bygaph, Inc., 56 B.R. 596 (Bankr. S.D.N.Y), In Re Westview 74th Street Drug Corp., 59 B.R. 747, 755 (Bankr. S.D.N.Y. 1986), and In Re Casual Male Corp, 120 B.R. 256, 264 (Bankr. D. Mass. 1990).

The party dispute therefore hinges on the meaning and purpose of Section 365(b)(3) and how and/or whether it adds additional requirements beyond those that I've already found are met for adequate assurance of future performance.

1991.

If -- and when I say Section 25, I'm referring to the Rea, which is incorporated -- that particular section is incorporated into the lease. According to the proposed assignee, Transform, I should look at the reference to financial and operational performance, in light of what the parties actually agreed to and determined was relevant to the right to assign. The landlord states that the contract between the parties is essentially irrelevant.

I conclude, for purposes of this section, as well as the other three subsections of 365(b)(3) that each requires reference back to the party's actual agreement, and that Congress did not create independent requirements that would not go to actual assurance of future performance, but rather wanted to focus the Court on, obviously still subject to Section 365(e), taking into account the landlord's rights under the lease, as implicated by these four subsections.

The case law in support of that view is extensive and persuasive. Perhaps the best analysis is again in the Ames Department Stores bankruptcy case, this time appearing at In Re Ames Department Stores 127 B.R. 744 (Bankr. S.D.N.Y. 1991). In that opinion, the Court was not interpreting Section 365(b)(3)(A), but rather (b)(3)(D), which states that adequate assurance of future performance of a lease of real property, a shopping center, includes

adequate assurance, that assumption or assignment of such lease will not destroy any tenant mix or balance in such shopping center.

In the Ames opinion, former Bankruptcy Judge Bushman notes again that the entire section is prefaced by a reference to adequate assurance of future performance of such contract of the lease itself obviously with the focus on the lease. He then noted the purpose of the statute, which was to protect the bargain between the parties, and finally noted the general bankruptcy law principal that unless specifically provided for in the Bankruptcy Code, bankruptcy does not rewrite the parties' non-bankruptcy bargained-for rights.

He concludes, "where there is no indication of any intention by Congress to do anything other than hold a shopping center Debtor-Tenant to its bargain with a landlord and to leave intact the property interests of debtor and landlord as set forth in that bargain, the Courts should not imply an additional non-bargained-for term. To construe the statute in the manner urged by," in that case the landlord, "would be 'a flight of redistributive fancy.'" That appears at Page 753.

That case law has been followed rather uniformly since then, including by the District Court in In Re A&P, 472 B.R. 678 through 679, again in connection with the

tenant mix issue, and In Re Toys R Us Property Company, 2019 Bankr. LEXIS 440 at Page 13 (Bankr. E.D. Va., Feb. 11, 2019). The landlord has contended that there are other cases going in the opposite direction and imposing a separate requirement that would not appear in the parties' lease under Section 365(b)(3).

Namely, it asserts In Re Rickel Home Centers, 240 B.R. 826, appeal dismissed, 209 F. 3d. 291, 3rd Cir. 2000, cert denied, 531 U.S. 873 2000. And In Re Casual Male Corp., 120 B.R. 256. A close reading of those cases does not really support that contention. In Rickel Home Centers, the primary purpose of the court throughout, in response to various landlords' objections in a shopping center context, to an assignment whereby the assignee would only occupy a certain part of the store, the store would go dark for a period of time, and the like, was as to the application of 365(e) to those contractual restrictions. And the Court concluded that, with limited exceptions, 365(e) should in fact, apply to invalidate those contractual restrictions, as a restraint based on the Debtor's financial condition of the right to assign.

One of the three landlords raised an objection, again under 365(b)(3)(d), based on not its contractual provision, but the general notion that tenant mix must be maintained, even if there is no such contract. The Court

concluded that under 365(e), the proposed assignee should be given a reasonable time to sublet the premises, which the subtenant agreed, in addition to stating that it would do so as quickly as possible, would be the specific time period that it stated it could do it in, which was, the assignee proffered six months. The Court accepted that commitment and overruled the objection.

But it first noted, although it did not have to rule on this basis, "The Court notes that the Bethlehem lease does not contain any provision prohibiting going dark to this extent. Net cannot argue that the assignment from the Debtor to Staples will interfere with any provision of the Bethlehem lease." It then went on to conclude that in any event, that I'm by which the assignee would be taking to sublet the premises was not unreasonable.

In Casual Male, the focus of the Court, as I stated, was on Section 365(b)(3)(A), but given the deposit of six months' rent in advance, and the support by the newly-formed tenants' principal, as well as working capital loan from its principal, that was sufficient similar financial condition and operating performance. One cannot take away from that decision, which of course would not be controlling precedent on me anyway, the belief that Congress created a new standard in Section 365(b)(3), that would override the parties' own agreement as a limitation on

assumption and assignment.

I will note one other case, In Re TSW Stores of Nanuet, Inc., 34 B.R. 299 (Bankr. S.D.N.Y. 1983), in which the Court again interpreted a restrictive use covenant and then went on to hold that it appeared in this situation there would be economic detriment to the landlord based on the respective assignee's stated intention to vary that covenant or breach it.

I conclude therefore that based on my general -- my findings with respect generally to adequate assurance of future performance, the differences in financial condition and operating performance are not such as to preclude the assignment of this lease, which has its own limitations on assignment in it, which I have found the Debtor and the assignee have satisfied.

For the record, I also conclude that if that legal determination is incorrect, and that the case law is cited and follow on the grounds of stare decisis is incorrect, then the financial condition and operating performance of Transform is not similar to Sears in 1991. Transform has not carried its burden to show, for example, that the ratio as far as its financial health, is the same, notwithstanding that it has shown that it's sufficiently financially healthy, when coupled with the favorable nature of the lease and deposit of an amount equal to the annual projected

monetary payment under the lease, that it is sufficiently healthy.

There's no issue as to percentage rent under the lease, and I believe I've already addressed the tenant mix point. But let me reiterate that there's no specific provision in the lease, other than a broad provision in Section 22(c) as to Sears and its assignee's right to use and assign the property, limiting tenant mix. Such broad provisions are well-recognized as not precluding an assignment generally in the shopping center context. See Ramco-Gershenson Properties L.P. v. Service Merchandise Company, 293 B.R. 169, for example. The lease also has very broad rights pertaining to use restrictions after the major operating period, or the tenant operating period, which the parties agree has already expired. And I do not believe that given that Transform will be bound by those broad use restrictions, and acknowledges it will be, that it's violating them as an assignee.

My determination with respect to the effect of 365(b)(3) is guided with respect to this lease by one other consideration. Based on the testimony before me, it appears to me that the landlord's main, if not primary, if not only, rather, concern is not necessarily to affirmatively usurp the value of the lease for its own benefit, as is the case in most of the cases cited, where the lease is favorable,

and the landlord has objected.

Rather, it appears to me that the landlord desires to control the property for the aggregate benefit of itself, which may mean that it would cut another very favorable lease to an anchor tenant. That does, in the abstract, fit into or conform with Congress's overall concern when enacting Section 365(b)(3), that the Court take into account the overall effect of the assignment on the shopping center and the landlord's interest in it.

However, consistent with my view and the Court's view, generally, that 365(b)(3) is to be interpreted in light of and limited by the parties' actual agreement, I note that Section 6.3 of the lease provides that "in the event that at any time, and from time to time after the expiration of the Sears operating period," which again has expired, "and until the term expires, the tenant decides to cease, and ceases to operate a store in the tenant building," which we know has occurred, "and further determines to sell, exchange, or otherwise transfer its interest in the leased premises," which we also know has occurred, "tenants shall, by giving landlord notice, first offer to landlord the right to purchase the same, one, at the price offered to tenant pursuant to a bona fide offer in a good faith, arms' length transaction, when a prospective purhcaser-assingee, unrelated to tenant, and on the same

So it actually does, in fact, have the control that it has stated, is its primary concern. And the issue then is simply, I believe, one where the parties are fighting over who has the right to the fair market value of the estate: the Debtor, by selling it to Transform, that is the leasehold estate: the Debtor, by selling it to Transform, or the landlord, by convincing the Court that its interpretation of 365(b)(3) preclude such an assignment. So, if Congress did, in fact, intend those provisions to, in the balance, between giving value to a Debtor and its creditors, and protecting the landlord, provide additional requirements, the parties' contract in fact does protect the landlord, while preserving the fair market value for the Debtor through an assignment to Transform.

I also will note finally that transform has represented on the record today that even if the landlord does not take up the -- or not exercise its right, under Section 6.3, it will not hold the landlord in suspense over tis commencement of reletting the premises for the full term of the lease, which has 73 more years to run, but rather will cap the outside date by which it will at least commence reletting the premises for two years on the condition that the landlord will not interfere with its marketing process.

The testimony is certainly not ample on this topic. I have the declarations of Transform's witnesses, as